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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (SUCCESSOR TO R. E. SCHUMACHER), RECEIVER OF THE FIRST NATIONAL BANK OF NEW BERN, NEW BERN, NORTH CAROLINA, PETITIONER,

vs.

CHARLES J. BRINSON.

BRIEF OF RESPONDENT.

L. I. MOORE,
Counsel for Petitioner.

MOORE & DUNN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF CHARLES J. BRINSON, RESPONDENT, ON THE WRIT OF CERTIORARI.

The respondent in this case has not had the advantage of any brief by the petitioner except such as was filed on the petition for certiorari, which writ was granted by the Court upon the application of the petitioner.

Statement of Facts Involved.

This cause was heard by the judge of the United States District Court, who, from the evidence intro-

duced before him, found the facts, and for a statement of facts the respondent quotes from the decree of the District Court and the opinion of the United States Circuit Court of Appeals.

His Honor I. M. Meekins in his decree (Record, page 22) stated the facts found by him, as follows:

> "That on or about the nineteenth day of October 1929, the plaintiff delivered to the said First National Bank of New Bern Thirty-nine Hundred Sixty-four and 60/100 ($3,964.60) Dollars in cash, or its equivalent, and directed and requested the said First National Bank to buy for him and for his account four thousand dollars in par value of United States Government bonds, Fourth Liberty Loan 4¼%, to be registered bonds in his name, and the said Bank undertook and agreed to accept and did accept said money for the purchase of such bonds for the plaintiff, and wrongfully failed and neglected to do so but commingled said funds with other funds in said Bank, advising the plaintiff that the bonds had been purchased in accordance with his directions and would be received in a few days, and continued to hold the plaintiff's money so commingled with the other funds in said Bank until the said First National Bank was closed and placed in the hands of the defendant Receiver on or about the twenty-sixth day of October, 1929; the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3,964.60) Dollars so placed in said Bank and wrongfully commingled and misapplied, was delivered to said Bank under the expressed direction and agreement for the purchase of the bonds aforesaid for the plaintiff and for no other purpose, and after

said money was so accepted by the Bank, it did not order or deliver the bonds to the plaintiff, and that the assets of said bank were increased and augmented by plaintiff's money to the full extent of Thirty-nine Hundred Sixty-four and 60/100 ($3,964.60) Dollars.

"That after the moneys of the plaintiff was so placed in the Bank for the purpose aforesaid and wrongfully and unlawfully commingled by the said Bank with its other funds, the said Bank at all times thereafter until it was closed and placed in the hands of the defendant Receiver, had more than sufficient cash on hand to pay the amount due the plaintiff and at the time the Receiver took charge of said Bank, took and accepted among the assets of said Bank more than sufficient amount in cash to pay the amount due to the plaintiff, and still has from the assets of said bank more than a sufficient sum in cash to pay the same."

His Honor Judge Parker, in the opinion of the Circuit Court of Appeals, from the record, stated the facts as follows:

"The facts are that the failed bank was engaged in the business of purchasing bonds for its customers and kept a regular account of funds delivered to it for that purpose. On October 10, 1929, complainant arranged with the officials of the bank to purchase bonds for him and was advised to bring in the necessary money and they would be purchased. He already had $1,961.31 on deposit to his credit and on October 14th, to provide the additional funds necessary, he deposited to his account $2,100.00 in the form of a check drawn on the Eastern Bank & Trust

Company. On October 19th he was notified that his account had been charged with $3,964.60 for the purchase of the bonds, and the records of the bank show that his account was actually charged with this amount on October 21st, and that on the same date the bond account was credited with a deposit of a like amount. The bonds were never in fact purchased, and the bank closed its doors on October 26th.

"At the time of the closing of the bank its cash and cash items amounted to $27,063.98 of which $14,658.18 was actual cash. On October 14th cash and cash items were $44,947.46 and cash $22,831.13. On October 19th they were $32,589.51 and $15,982.54 respectively. On October 21st they were $42,232.39 and $22,246.43. At no time during the period in question did cash and cash items fall below $27,000.00 or actual cash below $14,000.00.

"With respect to the $2,100.00 check drawn by plaintiff on the Eastern Bank & Trust Company, it appears that this was used by the failed bank in a clearance on October 15th, in which the failed bank received from the Eastern Bank & Trust Company $5,801.09 over and above the items which that bank presented against it. This $5,801.09 was in turn used by the failed bank in clearing with the Bank of Commerce & Trusts of Norfolk, and its balance with that bank, after the clearance, was exceeding $10,000.00."

Upon the foregoing facts, the District Court found that the fund belonging to the plaintiff was a special deposit in trust for the purpose declared and directed the receiver to pay the same in full out of the funds coming into his hands.

The Circuit Court of Appeals held "it would seem clear that as a result of the deposit by the plaintiff of the $2,100.00 check the assets of the failed bank were augmented by that amount at the time; but we need not go into this matter, as we are satisfied that upon an entirely different principle complainant is entitled to the relief which he seeks."

ARGUMENT.

The brief on the application for the writ of certiorari in this cause apparently misconceives the decision of the Circuit Court of Appeals for the Fourth Circuit, and in the specification of errors in the summary of argument apparently rests upon a theory not in accord with the facts of this case and not justified by the decision of the Circuit Court of Appeals, the Court in its opinion stating:

> "It should be noted that we are not dealing with a trust asserted on the ground that the assets of the bank have been augmented by a payment made to it. * * * What we have is in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose. *In other words, what the record discloses is, not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession.*" (Italics ours.)

I.

The decision of the Circuit Court of Appeals is in accord with the decisions of this Court and with the opinions of a large majority of the decisions of the Circuit Courts of Appeals and of the Supreme Courts of several States.

Quoting from the opinion of the Circuit Court of Appeals in this case:

> "There can be no question but that if complainant had actually paid over the cash necessary to purchase the bonds, the bank would have taken the same as a trust fund and if it had mingled same with the cash in its vaults, the whole would have been impressed with a trust in favor of complainant to the extent of the trust fund received. * * * It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor."

Where there is a deposit in a bank for a specific purpose, it is universally held that the money thus deposited must be applied to the purposes for which it was deposited. *It cannot be diverted therefrom. Southern Exchange Bank* v. *Polk,* 152 Ga. 162; *Eshbach* v. *Byers,* 164 Ill. App. 449; *Wilson* v. *Dawson,* 52 Ind. 513; *Dolph* v. *Cross,* 153 Iowa 289; *Bank* v. *Barger* (Ky.), 115 Southwestern 726; *State Bank* v.

Wehrli, 68 Neb. 75; *Strauss* v. *Tradesman's National Bank*, 36 Hun. (N. Y.) 451; *Page* v. *Springfield National Bank*, 12 Ohio App. 196; *Foscue* v. *National Bank* (Tex.), 210 Southwestern 555; *Hitt Fireworks Company* v. *Scandinavian-American Bank*, 114 Wash. 167; *Union Trust & Savings Bank* v. *Southern Traction Co.*, 283 Federal 50; *Corporation Commission* v. *Trust Company*, 193 N. C. 699.

In the case of *Morton* v. *Woolery* (N. D.), 189 Northwestern 232, 24 A. L. R. page 1109, the Court says:

> "Where money is deposited for a special purpose, as, for instance, in this case where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all or misapplies it, it can be recovered as a trust deposit. *Hitt Fireworks Company* v. *Bank*, 114 Wash. 167; *Dolph* v. *Cross*, 153 Iowa 289; *Smith* v. *Sanborn*, 247 Iowa 640; *Russell* v. *Bank*, 31 Idaho 59; *Bank* v. *Miller*, 46 N. D. 551; 7 *C. J.* 632."

In the case of *Smith* v. *Sanborn*, 247 Iowa 640, the Court says:

> "Of the general rule that a Bank to whom a depositor is owing a matured indebtedness may appropriate a general deposit of its debtor to the discharge of the obligation, there can be no doubt. * * * but it is no less certain that a deposit made for a special purpose or under a special agreement cannot rightfully be so ap-

> propriated (citing cases). Indeed the proposition that the Bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of its contract, is one which ought to require neither argument or citation of authority. The evidence shows without dispute that the check for $200.00 was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for, to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank and its attempt to appropriate the same was wholly without right or authority."

Quoting further from the opinion of the Circuit Court of Appeals in this case:

> "It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor. *Davis* v. *McNair* (C. C. A. 5th), 48 Fed. (2d) 494; *State* v. *Grills*, 35 R. I. 70; *Lumber Company* v. *Scandinavian-American Bank*, 130 Wash. 33; *State* v. *Exchange Bank of Bristow*, 112 Neb. 834.
>
> "In *State* v. *Grills, supra*, the rule applicable in such case is well stated as follows:
>
> "'The ordinary relation of a banker and his customer is that of debtor and creditor as to

the deposits made by the customer with the banker. This relation, arising upon a general deposit, may be changed as to the whole or a part of such general deposit. Without actual delivery to the customer, and a redeposit by him for a special purpose, such general deposit by agreement may be converted into a special deposit and become a fund in the hands of the banker with which he is intrusted for the specific purpose named in the agreement creating the special deposit. Such fund is impressed with a trust, the violation of which is a fraud.'

"The reason underlying the rule is that, by agreement between the parties, a general deposit may be converted into a special deposit (Morse on Banks and Banking, 6th Ed. vol. 1, sec. 188, p. 575), and that a special deposit is in the nature of a trust toward which the bank occupies the position of a trustee. *In re Gans & Klein*, 14 Fed. (2d) 116, 117; *Morse on Banks & Banking*, 6th Ed., vol. 1, sec. 325, p. 757; 3 R. C. L. 558."

In the case of *Lumber Company* v. *Scandinavian-American Bank, supra*, it is said:

"A special deposit on the other hand is where a depositor leaves his money with the bank for a particular purpose or for a particular use. It does not create the relation of a debtor and creditor, but rather that of trustee and *cestui que* trust. The banker obtains no title to the money and may not use it for its own purpose; his obligation being to apply it to the use and purpose for which he receives it. The distinction between the two forms of deposit is a wide one, not only as it affects the immediate parties

thereto, but as it affects other creditors of the bank. On the insolvency of the bank, all of its general depositors have an equal lien on its general assets and can have a return of no more than their proportionate share, while the special depositor may reclaim his entire deposit, if it is found intact, or, under the modern modification of the rule, may reclaim it from the general mass with which it has been commingled, if it appears that the bank has not, subsequent to the time of the commingling reduced the mass to an amount less than the amount of the special deposit. * * * Tested by the rule above stated, it is at once apparent that had the Lumber Company, instead of sending its check to the bank for the amount due on the interest payment, sent to the bank the cash for the amount due, it would, under the circumstances shown, have constituted a special deposit which it could have reclaimed in its entirety after the bank passed into the hands of the Supervisor of Banks, and this, notwithstanding, the bank might have commingled the money with its general cash deposits. A like result would have followed had the Lumber Company required its messenger carrying the check to the bank, to exact payment of the check, and, after payment leave the money so received with the bank as a deposit to pay the matured interest obligation when it became due. The difference between the transactions such as this and the transaction in question, it seems clear, is one of manner rather than one of legal effect. By presenting the check to the bank and directing what distinction should be made of the fund represented by it, the Lumber Company sought

to collect its part of the debt due it from the bank, and deposit the fund for a special purpose. In other words, it sought thereby to change a part of its general deposit into a special deposit. The bank by accepting the check with knowledge of the purpose of the Lumber Company, consented to the change. It thereby lost its right of general lien on the fund, its right of off-set against it, its title thereto, its right to use it for its own purpose, and had no right with respect to it, other than to pay it out in accordance with the directions of the Lumber Company. While the Lumber Company could have changed its terms with respect to the fund prior to its actual disposition in accordance with the directions given, the Bank had no such right. Its sole right and duty was to carry out the instructions given it by the Lumber Company. It follows from these considerations, we think, that the relation of the parties with respect to the fund were changed by the transaction between them; that their relation thereafter with respect to it was not that of debtor and creditor but that of trustee and *cestui que* trust. As between the immediate parties thereto, we conclude that it cannot be successfully contended that the lumber company was not entitled to claim the fund as a special deposit."

As a general rule, if property is converted and the trust fund can be traced, the *cestui que* trust may resort to a court of equity to compel its transfer to himself, and his right will not be affected by any change in the trust property brought about by the trustee without his consent, unless it has been transferred to

a *bona fide* purchaser or assignee for value and without notice. 2 *Pomeroy's Equity Jurisprudence,* 1058; *Barnard* v. *Hawks,* 111 N. C. 333.

The manner in which a bank has treated the funds, mingling them with its own money, does not affect the plaintiff's right to claim the amount from the funds on hand. The doctrine seems to be that where a wrongdoer knowingly commingles the property of another in such a manner that it becomes indistinguishable, the true owner may claim the whole mass, or, if it has been disposed of, may follow it or its proceeds, as the case may be, as long as he can trace it for the purpose of fixing an equitable lien on the property of which he has thus been dispossessed. *Peek* v. *Elliott,* 30 Kan. 156; *Kemphill* v. *Dickson,* 49 A. S. R. 869.

The case of *Titlow* v. *Sundquist,* in the Circuit Court of Appeals from the 9th Circuit, 234 Federal, page 613, was an action brought against a receiver of a national bank to recover $1,296.00 alleged to have been deposited by the plaintiff in the action with the defendant bank under an express agreement between the parties that the bank would pay it to one Smith in satisfaction of a note executed to her by one Gustafson for $1,200.00, upon which there was also then due $96.00 in interest, secured by a mortgage upon certain land. In that case, the Court held:

> "Manifestly the $1,296.00 left by Sundquist with the Bank, of which the Appellant is Receiver, to be paid over to Mrs. Smith upon her cancellation of the note and mortgage executed to her by Gustafson, was not of the latter character, but on the contrary, was deposited with

the bank for the specific purpose and under the express agreement of the bank to execute the purpose. It was in no sense a loan by Sundquist to the bank of $1,296.00, and the Bank did not owe him that sum or any other amount by reason of that transaction, but held it in trust for the purpose stated. The obvious result is that it did not pass to the general creditors of the insolvent bank, and on the failure of the latter to execute the trust for whatever reason, the owner of the money is legally and justly entitled to its recovery."

A case directly in point is that of *Montague and Others* v. *Pacific Bank and Others* (C. C.), decided by Judge Morrow and reported in 81 Federal 602, where a number of authorities are cited in support of his conclusion, which need not be repeated here.

In the case of *Dugan* v. *Security Savings Bank of Perry*, 217 N. W. (Idaho) 831, it is held:

"Where the holder of a certificate of deposit covering amount of premium on the bond deposited with the bank pending the delivery of the bond, demanded payment before the bank closed its doors and was induced to leave such an amount in the bank on a special deposit under an agreement to that effect, there was a trust relationship established between the bank and such depositor as bearing on the right to a preference after the insolvency of the bank. Where the holder of a certificate of deposit evidencing premium on the bond pending the issuance thereof demanded payment and was induced to leave the amount in the bank on special deposit, the funds of the bank were augmented

> to the extent of such deposit as affecting the right to a preference after insolvency, although and instead of actually receiving the cash, the bank's obligation to hold such an amount on special deposit was accepted."

To the same effect is *Evans* v. *Peoples Bank of Meadville* (Mo.), 6 Southwestern (2d) 655, where the plaintiff had drawn checks against her checking account for $8,000 and delivered the same to the bank's cashier with directions to invest the amount in Government bonds. The cashier invested half the amount in Government bonds and purchased a time certificate of deposit for the balance. The bank became insolvent. The bonds purchased for the plaintiff's account were delivered to her and she sued to establish a preference for the balance of the eight thousand dollars and her right to the preference was maintained.

The authorities on this position might be multiplied, but it seems to us these authorities clearly establish the principle announced in the opinion of the Circuit Court of Appeals. The distinction between general and special deposits is recognized by this Court in the case of *Marine Bank* v. *Fulton Bank*, 2 Wall 252, in which the Court says:

> "All deposits made with banks may be divided into two classes, namely, those in which the bank becomes a bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar in banking business in which the depositor for his own convenience, parts with the title to his money and loans it to the bank."

And this doctrine has been approved in several more recent decisions of this Court as well as in numerous cases in the Circuit Court of Appeals.

Montague v. *Pacific Bank, supra.*

Moreland v. *Brown,* 86 Federal 259 (C. C. A.).

Merchants National Bank v. *School District,* 94 Fed. (C. C. A.) 708.

Davis v. *McNair* (C. C. A.), 48 Fed. (2d) 494.

Schumacher v. *Harriett* (C. C. A.), 52 Federal (2d) 817.

Bartholf v. *Millett* (C. C. A., 8th), 22 Fed. (2d) 538.

In the case of *Emigh* v. *Earling,* 218 U. S. 27, this Court says:

> "No authority has been cited and we think none can be found to deny the power of a banking corporation to disgorge the property of another which it had got into its possession by any means whatever under the duty to disgorge. It may have had ~~no~~ legal power to take the step by which the money of this plaintiff's assignor came into its hands, but having taken such steps to obtain their money, no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity."

And, further, in the case of *Merchants National Bank of Hellena* v. *School District* #8, 94 Federal (C. C. A.) 705, it is said:

> "Neither a bank nor its Receiver can deny the receipt of money deposited with the bank as a

> trust fund *on the ground that no money was actually deposited* where it received and accepted credit for the amount with correspondents and received the money thereon in due course of business."

It being established that the money of the respondent in this case constituted a special deposit for a special purpose, as is uncontradicted by the evidence, we can find no authority and no justification for the refusal of the receiver to restore the money to the person to whom it of right belongs; and the matter of augmentation of assets does not arise, and the authorities cited by the petitioner upon these questions, all of which rest upon an entirely different state of facts and are not pertinent to the case under consideration.

It is contended that the decision of the Circuit Court of Appeals for the Fourth Circuit should be reviewed and reversed:

(*a*) For the reason that the same is in conflict with the principles of law established in similar cases in this Court, and upon this proposition is cited three United States decisions, neither one of which, we respectfully submit, are applicable to the case under consideration.

In the case of *Schuyler* v. *Littlefield*, 232 U. S. 707, this was a matter in bankruptcy, and the question there involved was wholly dissimilar, both in fact and in law, from the point under consideration in this appeal. In that case Brown & Company, by misrepresentation and fraud, secured from Schuyler, Chadwick and Burnheim 300 shares of Interborough stock on the promise of

giving their immediate check in payment of the same, properly certified, for $9,600.00. The effort of the plaintiff in that case was to follow that particular stock, which, upon the evidence, they failed to do, and the Court held they were not entitled to recover.

The case of *Cunningham, Trustee of Ponzi,* v. *Brown,* 265 U. S. 1, is also a case in bankruptcy, and the Court's decision in that case rested upon the construction of Section 60-*b* of the Bankruptcy Act as to preference, and we respectfully submit is not authority for the position taken in this case.

The case of *St. Louis & S. F. Railroad* v. *Spiller,* 274 U. S. 304, was a suit brought by the petitioner to recover from the purchaser under a foreclosure sale the amount of the judgment theretofore recovered against an insolvent railroad company for overcharges in freight and to have this judgment declared a preferential lien and compel its payment by the purchaser at the foreclosure sale. We do not think that this case can be considered as an authority, in fact or in law, for the principle sought to be asserted by the petitioner here.

Without an extended discussion of the facts in these respective cases relied upon by the petitioner, we think that it will clearly appear to the Court that neither of these cases are authority for the position which the petitioner undertakes to adopt.

Upon the contrary, the decisions of this Court are in thorough harmony with the decisions of the Circuit Court of Appeal, and the doctrine announced in *Peters* v. *Bain,* 133 U. S. 670, clearly establishes the right of the plaintiff in this case to recover.

"Formerly, the equitable right of following misapplied money or other property into the hands of parties receiving it, depended upon the ability of identifying it, but equity attaches only to the very property misapplied. This right was first extended to the proceeds of the property, and secondly to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind so as not to be distinguishable without any default on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that the confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass giving to the party injured by the unlawful diversion, a priority of right over the other creditors of the possessor."

This doctrine is announced in *Brennan* v. *Tillinghast*, 201 Federal 609, and is quoted in *Poisson* v. *Williams*, 15 Federal (2) 582, as follows:

"It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund which did not lose its character when mingled with the other moneys of the Bank, and that Brennan was entitled to recover the amount thereof as a preferred claim if and to the extent that he sustained the burden of proof of tracing this money through in its original shape or in a substituted form into the moneys which came into the hands of the Receiver as part of the assets of the bank, and proof that the *tort feasor* has mingled the trust fund with his own and made payment thereafter out of the common

fund, is, nothing else appearing, of sufficient identification of the remainder of that fund coming into the hands of the Receiver not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, because the legal presumption is that he regarded the law and neither paid out the trust fund nor invested it in other property, but kept it sacred. Proof that the Trustee mingled trust funds with his own and made payment out of the common fund is of sufficient identification of the remainder of that fund coming into the hands of the Receiver not exceeding the smallest amount the fund contained subsequent to the commingling (citing cases) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred. *Peters* v. *Bain*, 122 U. S. 670; *Allen* v. *U. S.*, 285 Fed. 678; *Board of Commissioners of Crawford County* v. *Strawn* (C. C. A., 6th), 157 Federal 49; *Board of Commissioners* v. *Patterson*, 149 Fed. 229; *Merchants National Bank* v. *School District* (C. C. A., 9), 94 Federal 705; *Carlson* v. *Kies*, 75 Wash. 171; *State* v. *Foster*, 5 Wy. 199."

It cannot be denied but that the agreement was made by the bank to purchase certain bonds for the plaintiff; that the plaintiff then placed into the funds of the bank the amount of cost of these bonds, to wit, $3,964.60; that this amount was then charged to the account of the plaintiff and placed in an entirely separate fund by the bank, though the proceeds were commingled with its other money, which was not there-

after subject to any check of the plaintiff, but constituted a special deposit for a specific purpose, to wit, the purchase of the bonds specified. This was in accordance with the agreement of the bank, which had received $2,100.00 of his money for this purpose and set aside the specific sum for the purchase of these bonds. The title to this money thereafter was in the plaintiff, and at no time thereafter did the bank have any right to divert this money or to apply it to any other purpose than that particularly specified and agreed upon.

The bank in this transaction was the bailee of a trust fund which belonged to the plaintiff. It has been proven that from that date to the date of the closing of the bank and at the time the receiver took over the institution he received this money from the bank, which in equity and in justice belonged to the plaintiff and should now account to the plaintiff for the same.

II.

There is no serious conflict in the decisions of the several Circuit Courts of Appeals upon this question.

What might appear to be a conflict in the decisions rests upon distinction in the facts of the several cases cited, and these cases cited do not conflict with the decisions of this circuit, and we submit that an examination of these authorities will show that they rest upon entirely different facts, and the general principle upon which the decisions of the Fifth Circuit and the Ninth Circuit rests are supported by these authorities.

III.

This case is not "Dealing with the trust asserted on the ground that the assets of the bank have been augmented by a payment made to it, but is in fact an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specific purpose."

And this distinction, so clearly analyzed in the opinion of the Court, differentiates this case from any of the authorities cited by the petitioner.

The Court's attention is particularly called to the statement in the brief of the petitioner, pages 18 and 19, which is wholly out of accord with the facts of this particular case, wherein the petitioner states as the facts of this case:

> "* * * With the understanding that the Bank would purchase approximately $4,000.00 of Liberty Bonds and charge his account for the amount thereof when purchased. In the meantime, the deposit was to stand to his credit for the full amount."

We submit that this statement is not supported by the facts of this case, the facts being as stated in the opinion of the Circuit Court of Appeals, as follows:

> *"The Bank charged his account with the price of the bonds and credited its bond account with the amount charged; in other words, it paid to itself the money necessary for the purchase of the bonds and charged itself with the same as Trustee. As it had in its vaults the funds to carry through the transaction as entered on its books, and as equity regards that as done which*

should have been done, funds to an amount necessary to purchase the bonds must be deemed to have been held in trust for that purpose.''

This case is not a case of shifting credits or bookkeeping entries, but, as a result of the agreement of the bank, a trust was impressed upon its cash to the extent of the amount of the trust fund received by the bank.

If this case rested upon the question of augmentation of the funds of the receiver, then we submit that there could be no question under the evidence of this case but that the $2,100.00 check drawn on the Eastern Bank & Trust Company, for which the First National Bank received and collected the full amount, would certainly be to this extent an augmentation, and the plaintiff would be entitled to recover, under any of the authorities, this amount.

But in this case the First National Bank took the entire amount of $3,964.60 of the moneys of the defendant with the express agreement to use this money for a special purpose, and thereafter the cash funds in the bank never fell below an amount that would be necessary to discharge this trust, and these funds passed into the hands of the receiver and are impressed with the trust to the extent of the amount so specially deposited and held by the bank.

Respectfully submitted,

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(1902)